Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

REPLY COMMENTS OF NICHOLAS BRAMBLE
INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL*

Nicholas Bramble
Information Society Project at Yale Law School
127 Wall Street
New Haven, CT 06511
nicholas.bramble@yale.edu

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***** Nicholas Bramble is a Postdoctoral Associate in Law and Kauffman Fellow in Law at the Information Society Project at Yale Law School. Valuable research assistance was provided by Anjali Dalal, Matthew Maddox, Christina Mulligan, Ramesh Subramanian, and other students and fellows at Yale Law School. The conclusions reached in this comment do not necessarily reflect the views of Yale Law School or Yale University.

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EXECUTIVE SUMMARY

In its Notice of Proposed Rulemaking, the Commission seeks comment on whether its proposed nondiscrimination rule "will promote free speech, civic participation, and democratic engagement" and conversely, whether the rule would "impose any burdens on access providers' speech that would be cognizable for purposes of the First Amendment." NPRM ¶ 116. The proposed nondiscrimination rule states that "*Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner*." NPRM ¶ 104. The following reply comment analyzes the First Amendment implications of this proposed rule and concludes that the rule affects neither the speech nor expressive conduct of Internet access providers in a manner that is cognizable for purposes of the First Amendment. Simply put, Internet access providers do not engage in speech or expressive conduct when they transport third-party content, applications, and other communications to users through their routers.

The activities of Internet access providers are not sufficiently imbued with speech to merit protection under the First Amendment. The technological architecture of the Internet as a communications system prevents access providers from exercising meaningful editorial discretion and control over the content and applications they convey through their networks. Because access providers are not speaking when they transport the lawful content and applications of others, a regulation of this activity cannot be considered a compulsion of their speech. Furthermore, Internet users do not perceive access providers to be speakers with respect to the third-party content and applications that users encounter on the Internet. Users are fully able to distinguish the speech of Internet access providers from the speech of the third-party information services they transport.

Finally, the fact that Internet access providers transport content and applications on the Internet does not indicate that any special or heightened degree of First Amendment protection applies to their conduct. The Commission's proposed regulation would ensure that when access providers route "lawful content, applications, and services" to users on behalf of some third-party information providers, they are also obligated to route lawful content, applications, and services to users from all other information providers. As was the case in *Rumsfeld v. FAIR*, this regulation does not affect the speech or expressive conduct of access providers, and would not be subject to any level of scrutiny under the First Amendment.

Even if Internet access providers were found to be speakers for purposes of the First Amendment—which is highly unlikely, for the reasons established in this reply comment—the Commission's proposed regulations would still easily survive any First Amendment challenge under the applicable intermediate scrutiny standard set forth in *Turner*. A court would find that the Commission's nondiscrimination rule does not burden substantially more speech than is necessary to accomplish the strong governmental purpose of preserving and promoting an open Internet.

I. THE ACTIVITIES BEING REGULATED ARE NEITHER SPEECH NOR EXPRESSIVE CONDUCT.

In its filing with the Commission, AT&T argues that Internet access providers are speakers for purposes of the First Amendment because "they may include original content in their offerings; they may engage in the editorial organization of content; and they may provide tailored offerings aimed at certain subscriber groups." AT&T Comments at 235-36. AT&T then suggests that the Commission's proposed rules would affect these speech rights in four ways: the rules would compel Internet access providers "to carry the messages of *all* content and application providers," bar them from exercising "editorial discretion," preclude them "from entering into arrangements that would allow them to provide high-quality content," and increase the expense of access provider speech "by necessitating capacity upgrades." AT&T Comments at 236.

The argument that an Internet access provider receives speech protection in its provision of *original* content should be set to one side for purposes of this discussion. Internet access providers may well deserve to be treated as speakers for the content they originate; the key question here is how they should be treated for the third-party content they merely convey.

The argument most salient to the proposed nondiscrimination rule is that Internet access providers engage in some form of protected speech through their "editorial organization" of the content requested by and delivered to subscribers. *See* AT&T Comments at 235. This argument is wrong, as is demonstrated by the close analogy between the conduct of Internet access providers and the conduct of the law school plaintiffs in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006). Internet access providers bring third-party speakers to end users just as law schools bring speakers (in the form of military recruiters) to law students. Neither party accrues speech rights through this facilitative process.

A. Internet access providers do not gain First Amendment protection through their delivery, transmission, or management of third-party content and applications.

In their comments before the Commission, Laurence Tribe and Thomas Goldstein compare Internet access providers to newspapers and other content providers, arguing that "[i]ndividuals and media outlets make countless decisions each day about what they will or will not say, and their decision not to communicate a particular message is entitled to the same First Amendment protection as their decision to communicate it." Time Warner Cable Comments, Ex. A at 2 (Laurence H. Tribe & Thomas C. Goldstein, *Proposed "Net Neutrality" Mandates Could Be Counterproductive and Violate the First Amendment* ("Tribe and Goldstein Comments")). Separately, Professor Tribe has argued that

> [t]he Supreme Court has unanimously recognized that when you are a provider of communication, the right to decide what you will include in the package and what you will exclude—whether you will tell the consumer, "if you're going to get this channel, you also have to get the Discovery Channel" or "if you're going to get this, you also have to get C-SPAN like it or not"—is at the heart of First Amendment freedom.

Laurence H. Tribe, Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism, Speech at Progress & Freedom Foundation (Sept. 2007).

Autonomy for *speakers* (including content providers when they themselves are speaking) is an important First Amendment value, as the Supreme Court has affirmed in a variety of cases. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech."). But the conduct and the "decisions" that the Commission proposes to regulate in the present situation are not similarly expressive, and would be badly misunderstood under First Amendment doctrine if they were classified as speech. These activities differ from the

conduct and decisions engaged in by organizers of a parade, a cable broadcasting system, a newspaper, and a variety of other forums for expression.

First, Internet access providers do not engage in speech through their provision of Internet access to subscribers; rather, providers simply route bits of information from users to third parties, and from third parties back to users. The First Amendment no more shields their activities than it would shield the Postal Service, or a courier firm, that wished to selectively and secretly delay some of the letters it carried. Second, Tribe and Goldstein are incorrect to suggest that the Commission's nondiscrimination rule "seeks to override the decisions of [Broadband Service Providers] about what content they will deliver to their subscribers," Tribe and Goldstein Comments at 3, because it is *users*, not Internet access providers, who make these decisions about what kinds of content to send and receive. Finally, by transporting external content and applications to users, Internet access providers do not indicate endorsement of, or agreement with, that content. Internet users have proven themselves adept at distinguishing between speech that an Internet access provider *sponsors* and speech that an Internet access provider simply transports. *See Rumsfeld v. FAIR*, 547 U.S. at 65 ("[H]igh school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."). Accordingly, the promulgation of a legal requirement that Internet access providers offer access to all lawful content and applications provided by third parties does not impinge upon the speech rights of these providers under the First Amendment, and does not give rise to a compelled speech violation.[1]

1. The activities of Internet access providers are not sufficiently imbued with expressive content to merit protection under the First Amendment.

The mere fact that Internet access providers carry the communications of others is, on its own, insufficient to bring a regulation of the actions of providers within the scope of First Amendment scrutiny. "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Rumsfeld v. FAIR*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[2] Similarly, although the Supreme Court has worked from a broad understanding of the number and types of "messages" that count as speech, *see, e.g.*, *Hurley*, 515 U.S. at 569 (including the artistic works of Pollock, Schönberg, and Carroll within the limits of First Amendment protection despite their randomized, atonal, or nonsensical character), the Court has consistently rejected the notion that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Rumsfeld v. FAIR*, 547 U.S. at 65-66 (quoting *O'Brien*, 391 U. S., at 376). (Nor is it obvious that Internet access providers intend to express ideas through the management of network traffic.) Conduct must be "inherently expressive" in order to merit First Amendment protection. *Id.* at 62 (finding that a school's decision to permit recruiters to enter campus was not inherently expressive). Conduct is not "inherently expressive" where it must be accompanied with additional speech in order to explain its meaning. *See id.* at 66.

Communications technology is fundamentally about *transmission*, not speech or expression. The expressive, propositional, or informational value associated with a communications technology is located not within the technical infrastructure itself, but rather in the content that flows through that infrastructure. The administrators and access providers who *implement* a communications technology—but do not create or alter the underlying bits of individual communications—do not express *themselves* through their activities. Rather, they facilitate the expression of others. Similarly, the expressive content in a letter or package does not convert the transportation and delivery activities of FedEx, UPS, or DHL into speech or expressive conduct.

In some other communications contexts, such as broadcast-based media, the owner and operator of a centralized infrastructure must decide which content and what programs to include in the channels it makes available to subscribers. In those settings, the selective activities of broadcasters may more closely resemble speech and expressive conduct. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) (*Turner I*). But unlike the cable network at issue in *Turner*, Internet access and transport involves routing whatever data the parties request from one place to another, *see* Philip J. Weiser, Toward a Next Generation Regulatory Strategy, 35 LOY. U. CHI. L.J. 41 (2003) (describing the "advent of digital, packet-switched broadband networks that carry all forms of communication"), not upon the centrally managed delivery of carefully programmed channels.

Internet service providers manage their networks to ensure fast and efficient communication from sender to recipient. These activities facilitate a communicative purpose by linking one party to another, and by ensuring the stability and reliability of that link. But the role of the Internet access provider is conveyance rather than expression. The transmission link enables two external parties to accomplish their communicative goal, but contains no expression of its own. Indeed, a link that did interject content of its own would interfere with the communication taking place between the external parties. Under Internet Protocol, a communication packet typically arrives in one form at the router of an Internet access provider and leaves in the same form.

An Internet access provider delivering web content to a user has, at heart, nothing more to do than an act of translating a user's request into the bits that objectively correspond to that request, and then delivering those bits back to the user's browser. No creativity and no substantive editing takes place during this process. In managing the network through which this content flows, an access provider may attempt to block spam, viruses, and other malicious software, and may act to resolve network congestion. However, these network management practices all seek to ensure the rapid and objective satisfaction of a user's request, not to provide any content or speech above and beyond what the user has requested.[3]

Transportation and communications services may provide the simplest analogue to Internet access, but there also exist a variety of additional media that transmit expressive content to users, such as airplane navigation charts and aeronautical charts, which do not trigger First Amendment scrutiny. *See, e.g.*, *Brocklesby v. United States*, 767 F.2d 1288

(9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339 (9th Cir. 1981). What is important in geographic, navigational, and instrument approach charts is not the original expressive function performed by the charts but rather the charts' ability to inform their users, and the corresponding ability of users to rely upon these media for their needs. *See Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342 (9th Cir. 1981) ("While the information conveyed in words and figures on the Las Vegas approach chart was completely correct, the purpose of the chart was to translate this information into an instantly understandable graphic representation. This was what gave the chart its usefulness; this is what the chart contributed to the mere data amassed and promulgated by the FAA.") Courts have been explicit in articulating the importance of this reliance interest, *see id.* ("It was reliance on this graphic portrayal that Jeppesen invited."), and in using that reliance interest, rather than any ostensible speech interest, as a basis for legal evaluation. *See, e.g., id.*

Charts enable navigation in roughly the same way that Internet access enables online communication: by translating or transmitting data provided by other content providers into a form that is accessible to their own users and subscribers. The Commission's proposed regulations are an attempt to ensure that the communication facilities on which Internet users depend will continue to "translate this information into an instantly understandable . . . representation," just as is the case with navigation charts. *See Aetna Casualty & Sur. Co.*, 642 F.2d at 342. The effective and efficient exchange of Internet communications from one speaker on the Internet to another cannot take place if an intermediary interferes with the integrity, reliability, and certainty of the transmission process. Thus the Commission's proposed rule should ensure that those who create Internet applications and content can rely on the underlying networks on which their information is shared not to shift unpredictably based on circumstances and factors that are only knowable to the access provider and network manager.[4]

> 2. Because Internet access providers are not speaking when they transport the lawful content and applications of others, their activity cannot be considered as compelled speech.

In cases where a medium, forum, or technology fulfills a fundamentally facilitative role, the administrator of that medium will generally not be found to be engaging in expressive conduct or speech. *See, e.g., Rumsfeld v. FAIR*, 547 U.S. at 64 ("[A] law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs."). Thus a rule requiring the administrator of such a medium or forum to accommodate an external message would not amount to compelled speech "because the accommodation does not sufficiently interfere with any message of the [medium or forum]." *Id.* at 64.

However, resisting the above description of the non-expressive nature of routing and transporting Internet traffic, Verizon argues that the proposed nondiscrimination rule triggers and fails First Amendment scrutiny because it "interferes with a speaker's

judgment on what speech to feature or promote." Verizon and Verizon Wireless Comments at 115 (citing *Hurley*, 515 U.S. 557).

In *Hurley*, the Court held that the organizers of a parade had First Amendment protection, and could not be compelled by the state to include a group of marchers whose message the parade organizers found objectionable. The parade organizers were free to exclude a group of gay, lesbian, and bisexual marchers whose message was "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *See* 515 U.S. at 574.[5] The imprecision and inexactness of the message carried by the parade was tempered by the recognition on the part of parade organizers, parade audience members, and would-be parade participants that a clear message would be sent by the inclusion or exclusion of a group that had been "formed for the very purpose of marching in" the parade. *Id.* at 570. Both organizer and participant were well aware of the "message" the other side wished to communicate, the importance and salience of this message, and the corresponding importance of their prospective participation in the parade. *See id.* at 569 (listing various forms of symbolic expression in a parade including spectators, costumes, uniforms, flags, banners, bands, and floats conveying political and moral messages to spectators and a television audience); *id.* at 568 ("characterizing parades as "public dramas of social relations" where "performers define who can be a social actor and what subjects and ideas are available for communication and consideration" (quoting S. Davis, Parades and Power: Street Theatre in Nineteenth Century Philadelphia 6 (1986))). Because the presence of a gay pride banner would likely convey to the public that the parade organizers approved of the group's message, *see id.* at 575, the Court held that parade organizers could not be compelled to carry this message.

Hurley, in short, stands for the limited principle that where groups of people seek to make a "collective point" through their participation in a shared activity, 515 U.S. at 568, *and* the messages espoused by participating groups will be reasonably imputed to the managers of the activity, the managerial choices as to which viewpoints to disseminate and which to exclude are protected by the First Amendment. *See id.* at 576 (declining to "force[] upon a speaker intimately connected with the communication advanced" the "dissemination of a view contrary to [its] own").

Numerous factors distinguish the provision of Internet access from the organization of a parade. Unlike the parade organizers in *Hurley*, AT&T, Comcast, Verizon, and other Internet access providers are unable to articulate an instance in which the Commission's proposed regulations would "interfere with any message" that they as Internet access providers wish to communicate. *Rumsfeld v. FAIR*, 547 U.S. at 64. Doubtlessly, some businesses rely on nondiscriminatory Internet routing, and other businesses—notably Internet access providers—may profit by moving to discriminatory models, particularly given the oligopolistic character of the market for Internet service. But this economic interdependence has no bearing on the putative speech interests of service providers.

In practice, a discretionary decision made by organizers of an Internet access network to deny the transmission of a particular content or application provider's services likely has

more to do with the assertion of economic leverage than with any desire to "propound a particular point of view" to users. *Cf. Hurley*, 515 U.S. at 575. Similarly, website operators and other information service providers do not understand themselves to be subjecting their speech and data to the editorial discretion of access providers. *Cf. id.* AT&T's continued transmission of Google's (or any other information providers') services may be essential to Google's business model, but it does not bear on the question of whether AT&T is going to *speak* as it currently speaks. The speech of AT&T takes place elsewhere: among other places, on its public policy blog and website. *See, e.g.*, AT&T Public Policy Blog, http://attpublicpolicy.com; AT&T, http://www.att.com.

Fundamentally, the purpose of providing Internet access is not to convey the viewpoints of an access provider (such activities can easily be performed on the access provider's own website), but rather to create an *opportunity for an exchange of information* between users and content and application providers (which may include the access provider acting in its capacity as a content and application provider). The Commission seeks to provide "a non-discriminatory platform for the robust interchange of ideas." NPRM ¶ 116. This purpose of creating an opportunity for the open exchange of "lawful content, applications, and services," NPRM ¶ 104, is analogous to the purpose of the law at issue in *Rumsfeld v. FAIR*, which enabled information exchange between military recruiters and students, and ensured that these parties could discuss a potential employment relationship in a space that the school had already opened up to other parties engaging in similar discussions. *See* 547 U.S. at 53 (citing the Solomon Amendment's informal policy of "'requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters'" (citation omitted)). In upholding that law, the Court rejected a number of First Amendment objections. It would similarly reject the objections offered here.

The Commission's proposed regulation would enshrine a principle of equal access analogous to that found in the Solomon Amendment, which required that when schools "send e-mails or post notices on bulletin boards on an employer's behalf," they are equally obligated to "send e-mails and post notices on behalf of the military." 547 U.S. at 61. In the context of Internet access, the proposed regulation would ensure that when access providers route "lawful content, applications, and services" to users on behalf of some third-party information providers, they are also obligated to route lawful content, applications, and services to users from all other information providers. In *Rumsfeld v. FAIR*, the Court rejected the schools' First Amendment objections to this sort of equal access rule on both jurisprudential and historical grounds. The Court noted that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Compare id.* at 62 (upholding law promoting equal access to recruiting services), *with West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating law forcing schoolchildren to pledge allegiance to the flag) *and Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating law requiring drivers to carry certain state-approved messages on their license plates such as "Live Free or Die"). First Amendment objections to a rule compelling Internet access

providers to offer the same kind of nondiscriminatory access should trigger this same conclusion.

Internet access is a commodity input, essential to basic participation in a networked ecosystem and to a wide variety of economic and informational exchange systems engaged in by users and third-party content and application providers. Twitter, Facebook, Google, Yahoo!, MSN.com, and a variety of similarly structured information services seek to enter the economic marketplace of the Internet and to participate in an international network of networks on which they have built their businesses. These companies' participation and desire for interaction with the end users of AT&T, Verizon, Comcast, and other access providers is a matter of functioning effectively as search engines, social networks, and application providers, and of drawing upon the network effects that hinge upon reaching as many end users and searchable websites as possible. Content and application providers are similarly situated insofar as they seek to convey speech and data through access providers' networks to a maximal number of end users.

The "principle of speaker's autonomy" so central to First Amendment jurisprudence, *see, e.g.*, *Barnette*, 319 U.S. at 642; *Pacific Gas & Electric*, 475 U.S. at 20; *Hurley*, 515 U.S. at 576; *Rumsfeld v. FAIR*, 547 U.S. at 61 ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."), is simply absent in the context of Internet access providers' non-expressive transmission of data packets containing information generated by third parties. While these third parties may gain a speech interest through their provision of original, edited, or carefully aggregated and arranged information,[6] no such interest accrues to those who provide transportation pathways for this information. Accordingly, First Amendment scrutiny of any rule requiring Internet access providers to maintain these transportation pathways by offering nondiscriminatory access to the Internet is inappropriate.[7]

> 3. Internet users do not perceive Internet access providers to be speakers with respect to the third-party content and applications users encounter on the Internet.

The conduct of Internet access providers in routing third-party content and applications to users is highly unlikely to be understood by users as the articulation of an access provider's "message." The absence of such an implication weighs heavily against First Amendment protection for Internet traffic routing.

Generally, conduct will be found to be expressive if it communicates some kind of a message, either directly or more diffusely through some broader medium of expression. In considering whether there exists speech or conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment," *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam), the Supreme Court has asked whether an intent to convey a message was present and "'[whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 403-04 (1989) (quoting *Spence*, 418 U.S. at 410-11); *Hurley*, 515 U.S. at 569. Accordingly, conduct will fall within the scope of First Amendment protection

where (a) an intent to convey a message is present—either by virtue of a speaker's particular intent or through an administrator's expressive accommodation of a speaker's message—and (b) viewers understand some message to be communicated by the conduct or speech.

Both of these factors must be satisfied in order for conduct to fall within the scope of First Amendment protection. In contrast, where there is not a great likelihood that "'the message [of particular conduct] would be understood by those who viewed it,'" then that conduct will generally not "possess[] sufficient communicative elements to bring the First Amendment into play." *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-411).

Notably, even the confluence of (a) an intention to exclude a viewpoint and (b) actions taken to implement that intention is insufficient, on its own, to find that those actions carry sufficient speech or expressive conduct to fall within the scope of the First Amendment.[8] In *Rumsfeld v. FAIR*, a number of law schools sought to convey their disapproval of the military's "Don't Ask Don't Tell" policy by blocking military recruiters from campus. Nevertheless, the Supreme Court found that "accommodating the military's message does not affect the law schools' speech, *because the schools are not speaking* when they host interviews and recruiting receptions." 547 U.S. at 64 (emphasis added) (noting that "a law school's decision to allow recruiters on campus is not inherently expressive").

The crucial factor in *Rumsfeld v. FAIR* was whether *users* of the law schools perceived the schools to be engaging in speech through their inclusion or exclusion of military recruiters. *See* 547 U.S. at 64-65. The Court held that the mere fact of hosting (or not hosting) "interviews and recruiting receptions" on campus was insufficient to demonstrate that the hosts approved of the speech engaged in by their guests on campus. *See id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters . . . . We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."). Rather, the question of whether the owner of a conduit was responsible for the messages and expressions flowing through that conduit depended on whether students identified the owner *as a speaker or supporter of those messages* and expressions. *See id.* at 65. Where a forum like a school—or, arguably, like a communications network—is "repeatedly . . . used by a wide variety of private organizations . . . there [is] no realistic danger that the community would think that the [forum administrator] was endorsing" any one of these particular organizations. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 395 (1993); *see also Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place.").

Dwelling on the importance of user perceptions, the Court noted that "*an observer* who sees military recruiters interviewing away from the law school *has no way of knowing* whether the law school is expressing its disapproval of the military, all the law school's

interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Rumsfeld v. FAIR*, 547 U.S. at 66 (emphasis added). Similarly, in *PruneYard Shopping Center v. Robins*, no First Amendment violation was found where users were not under the impression that the owner of the shopping center necessarily shared the views of those who happened to be protesting at his shopping center. 447 U.S. 74, 87 (1980) ("It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner."). In both cases, the Court analyzed the expectations of users within these forums and found that users would not expect the administrators of these forums to be responsible for the speech that passes through these conduits.

Conduct engaged in by a law school administrator and shopping center owner is analogous to the conduct an Internet access provider engages in when facilitating the transmission of third-party content and applications to its users. As in *Rumsfeld v. FAIR*, nothing about either the provision and functionality of Internet access or the nature of subscribers' understanding of Internet access suggests—in any consistent or fundamental way—that Internet access providers agree with the speech, messages, and information provided by external content and application providers. Users simply do not understand the views of Internet access providers to be somehow embedded in the third-party content and applications transported by these access providers to users. Faced with a slow or inaccessible website or application, for instance, a subscriber would have no way of knowing whether that content was being slowed down or blocked by her Internet access provider—or by some external cause such as another entity's network congestion, another entity's (such as a government's or browser provider's) decision to block the website, or the website provider's own lack of funding or explicit decision not to transmit content at that time and location. Because the blockage of a site does not inherently express an Internet access provider's disapproval of that site, and because access providers can only make their expression manifest to users by separately providing speech that explains their conduct, the blockage or degradation of the speed of a website cannot constitute expressive conduct. *See Rumsfeld v. FAIR*, 547 U.S. at 66 ("An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.")

Nor do users typically understand an access provider to be communicating a message through its inclusion of informational content, even when that content is fraught with strong ideological or moral expression. From the perspective of a user there is no sense in which RCN (or any other Internet access provider) is seen as speaking, making, editing, performing, endorsing, or even acquiescing to the content delivered through an Internet connection that happens to be provided by RCN. Rather, users view their Internet access provider as a neutral gateway to the open and unfiltered Internet—an impression that is affirmed by the advertising materials of the providers themselves. *See, e.g.*, RCN, http://www.rcn.com/internet/highspeed/optimization.php (last visited Aug. 19, 2008) (claiming that the RCN network is built "so you can enjoy the Internet the way it was

intended to be—fast and uncapped"). Users of Internet access providers do not treat the provision of a site as a value judgment made upon that site by the access provider.[9] Rather, users understand the provision of Internet access as a gateway to a forum where content providers, application providers, and other users are free "to come and go as they please." *See PruneYard*, 447 U.S. at 87.

Users see AT&T, Comcast, Verizon, and other access providers as neutral conduits, and tend to hold the originator of content—in most cases, an original author or publisher—responsible for that content, rather than placing any blame on the transmitter of the packets in which this content is enclosed. In *Turner I*, the Supreme Court found that based on "cable's long history of serving as a conduit for broadcast signals," there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U.S. at 655. This risk is far more attenuated in the context of the Internet, where access providers engage in little if any of the content cultivation and programming engaged in by cable operators and broadcasters.

The absence of any user assumption that Internet access providers speak or endorse the content and applications that flow through their conduits is further demonstrated by the fact that users tend not even to hold *information* intermediaries such as platform proprietors (Facebook, Myspace, Twitter, YouTube, etc), aggregators (Google, Yahoo, Bing, etc), and facilitators (Skype, Vonage, AOL Instant Messenger) responsible for the information conveyed on their services, let alone the *network* intermediaries through which users access these platforms, aggregators, and facilitators.[10] Responsibility, both legal and ethical, falls on the originator or end user of the content.

> 4. Internet access providers have the ability to distinguish their own speech from the speech of third-party content and application providers that they transport to users, and this ability is frequently exercised.

There are numerous opportunities and forums through which an Internet access provider can distinguish speech provided by external parties from its own speech, and disclaim any affiliation with the views or messages contained in the speech it carries. The existence of these opportunities provides further evidence that an Internet access provider would not be deemed to be the speaker of the third-party content and applications that it routes to its users.

The forum owner's ability to *disclaim association* with the speech of those using his forum was a crucial element of the Supreme Court's holding in *PruneYard Shopping Center v. Robins*. There, a shopping mall owner was able to "expressly disavow any connection with the message [of protestors] by simply posting signs in the area where the speakers or handbillers stand." 447 U.S. at 87. Such ability to "disclaim any sponsorship" of a message generated by other content providers militated against a finding that the owner would be understood to have expressed that message. The Court built on this finding in *Turner*, where the existence of a "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use

the broadcast facility" augured against a finding that the speech of broadcasters would be unlawfully compelled by the must-carry rules at issue in that case. 512 U.S. at 655. Finally, the court found in *Rumsfeld v. FAIR* that the plaintiff law schools would "remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy." 547 U.S. at 60 (noting that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests" in response to the obligation to allow military recruiters to enter their campus). In contrast, the corresponding *absence* of any ability or "customary practice" within parades "whereby private sponsors disavow 'any identity of viewpoint'" was an important factor in the court's holding that requiring these parades to include messages from all comers would violate the organizers' First Amendment rights. *Hurley*, 515 U.S. at 576-77.

As was the case with the state law upheld in *Pruneyard Shopping Center v. Robins*, the Commission's proposed regulations require only neutral access, do not force Internet access providers to carry a governmental message, and permit express disavowal of endorsement by the access provider. 447 US. 74, 86 (1980).[11]

There is nothing about the Commission's proposed regulations that restricts what Internet access providers may say about the policies and practices of the content and applications that they route to their users (or, for that matter, the policies of the government in requiring them to transport this data to users in a nondiscriminatory fashion), just as there was "nothing in the Solomon Amendment [that] restricts what the law schools may say about the military's policies." *Rumsfeld v. FAIR*, 547 U.S. at 65. Were AT&T or another Internet access provider to wish to disclaim any association between itself and the packets it transmits, it would be able to do so through an announcement on its own website "portal," http://att.net, just as Comcast would be able to do so on http://comcast.net and Verizon would be able to do so on http://verizon.net and on a variety of other affiliated websites. It would also be perfectly within the rights of these providers to include a notice on a billing statement or in another piece of direct mail or email to its subscribers disclaiming affiliation or approval with the content of the packets transmitted over its networks. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (holding that appellant's delivery of a newsletter containing political editorials in the same envelope as its billing statement "receives the full protection of the First Amendment"). Furthermore, an access provider could place an AT&T, Comcast, or Verizon logo somewhere on content and applications that it has created or is otherwise responsible for, in order to distinguish in-house content and applications from that which was generated by external providers. Viewers would come to understand the absence of such a logo as an indication that the content or application had been generated by someone else.

Notably, the fact that Internet access providers for the most part do *not* issue such disclaimers, even though the option is clearly and frequently open to them, indicates that both access providers and users are unlikely to assume that the views of third-party content and application providers would "be identified with those of the owner" granting these parties access to its routers. *See PruneYard Shopping Center v. Robins*, 447 U.S.

74, 87 (1980) (views expressed by speakers who are granted a right of access to a shopping center would "not likely be identified with those of the owner").

> 5. Internet access providers' function as a transportation conduit through which users gain access to the larger world of third-party content and applications on the open Internet is easily distinguishable from situations in which ISPs are originators of content.

Courts are unlikely to view the activities of access providers as sufficiently weighted with symbolic or expressive intent to merit protection under the First Amendment, because they are barred—by law in some cases, and by expectation, tradition, and practice in others—from making decisions about what content to include or exclude when serving as a transportation conduit between users and third-party content and application providers. The information that an Internet access provider transmits in such situations is incidental to a communication between two external parties.

In light of the Commission's 2002 decision to classify high-speed cable access providers as Title I-regulated information services and its 2005 decision to apply the same classification to DSL providers,[12] the formal statutory basis for imposing Title II interconnection requirements on telecommunications infrastructure providers fell away,[13] and cable and DSL providers were no longer under any obligation to open their networks to third-party access providers. However, Comcast, AT&T, Verizon, and other DSL and cable broadband services continue to function primarily as neutral conduits with respect to their routing and delivery of information from application and content providers to subscribers, and vice versa.[14] Accordingly, they share few if any of the expressive indicia of cable, parade, and newspaper systems.

In addition, these dominant access providers have continued to take advantage of legal protections and immunities commonly granted to general-purpose transportation services. Despite not operating as Title II-regulated common carriers of telecommunications, access providers have frequently invoked and advocated for immunity from copyright and defamation liability by positioning themselves as mere conduits or carriers of content, rather than as expressive speakers or editors of that content. In this manner, they are distinct from cable operators and newspaper publishers, who seldom if ever characterize themselves as neutral conduits for information and applications provided by others. *See, e.g., Turner I,* 512 U.S. at 653 (noting that broadcaster appellants "maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to transmit speech not of their choosing").

For instance, Section 230(c)(1) of the Communications Decency Act ("CDA") provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230 of the CDA was effectively an effort to grant "interactive computer service[s]" (a category within which Internet access providers fall) a common carrier-*style* immunity from liability for the user-generated content they transport through their networks, without at the same time burdening providers with the full array of

common carrier obligations. *Compare* CDA § 230(c)(1) (granting interactive computer services immunity from defamation liability), *with Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) (describing a "quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business").

Analogously, in the copyright context, Section 512(c)(1) of the Digital Millennium Copyright Act ("DMCA"). provides that "[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . . ." This legal principle that an Internet intermediary is "not a speaker" and is to be distinguished from the publisher, speaker, or user of information has taken firm hold and serves as a settled expectation around which a thriving Internet economy and ecosystem has been built. This settled expectation—along with the expectation of immunity created by CDA § 230(c)(1)—would be severely dislodged by a judicial determination that Internet access providers are in fact speakers, publishers, or editors of the content that they transport on their networks.

At the same time, the Commission's proposed regulations are consistent with a recognition that access providers may become direct information providers in contexts where they create, aggregate, and organize content for their users. Through use of the label "Internet access providers," the Commission has signaled a willingness to treat providers with a bifurcated set of rules depending on whether they are positioning themselves as conduits through which users may gain access to the open Internet—or whether they are positioning themselves as providers of specific content-driven services to those users. Where an access provider also functions as an *originator* of Internet packets, rather than as a *router* of packets, that access provider is engaging in speech. *See Turner I*, 512 U.S. at 637 (classifying a cable provider as a First Amendment speaker to the extent that it engages in "original programming"); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (noting that a cable provider may gain speech rights through exercising "a significant amount of editorial discretion regarding what their programming will include").

For instance, an access provider such as AT&T may occasionally transmit its own in-house content over the regular, neutral Internet to all end users (not necessarily just to subscribers). *See* AT&T Comments at 236 note 517. AT&T points out that it "owns and provides a wide variety of Internet content that is available over its own and other service providers' networks," listing not only its in-house sports and entertainment video programming (*e.g.*, http://entertainment.att.net/tv and http://fanzone.att.net) but also the fact that "the default home page for AT&T's wireline Internet access service is 'powered by Yahoo!' and includes a variety of Yahoo!-provided content, such as weather, sports, news, games, and video." AT&T Comments at 236 note 517. Based on these service offerings, AT&T argues that it "clearly is a First Amendment speaker in its capacities as an Internet service provider and content provider." *Id.* AT&T suggests that the codification of a nondiscrimination rule by the FCC might prohibit AT&T from featuring its own content in these ways, because "AT&T's selection of featured content arguably

involves 'discrimination' in favor of such content and against content from other entities." *Id*. Verizon offers similar comments, suggesting that broadband providers are "engag[ing] in speech by providing video programming to their customers" that is increasingly "integrated with the Internet." Verizon and Verizon Wireless Comments at 112.

Certainly, in the course of providing Internet access to their subscribers, broadband access platforms often integrate basic telecommunications transport with enhanced information or data-processing services that may be unique to the Internet access provider's network. Yet there is no language in the Commission's proposed rules barring an Internet access provider from making content, applications, and other communications available in this manner on its own website. The Commission specifically suggests that some services such as "IP-enabled 'cable television'" are delivered "over the same facilities as broadband Internet access service, but may not themselves be an Internet access service and instead may be classified as distinct managed or specialized services" not subject to the proposed regulations. NPRM § 108. The Commission's proposed rules would not necessarily bar entities that function as Internet access providers from hosting their own websites or from making available their own content offerings, so long as no preferential treatment is bestowed on these offerings and no discriminatory treatment is imposed on unaffiliated offerings (either in terms of higher prices or degraded quality). Nor would the proposed regulations bar AT&T from offering various email and web-hosting services as part of the Internet access package it makes available to subscribers.

Despite some measure of integration, it remains possible to distinguish "managed services," such as subscriber-only video programming and the "Yahoo!-provided content" referred to by AT&T, from "Internet services," such as the basic routing and transport of data, information, content, and applications back and forth from a third-party provider to a user. Various factors can be used in making this distinction: whether traffic on this service is identified and routed using TCP/IP or some other protocol; whether content and applications are portable across multiple devices, networks, and architectures; whether a paricular services is held out to consumers as Internet service or as a managed service; whether a service is unique to the access provider's network or is common to all Internet users; what users' expectations are regarding the breadth of access offered by the service; and how users actually experience and use the service.

Even in cases where an Internet access provider has entered into deals with content providers such as Disney or ESPN360.com, the provider typically demarcates such service offerings from its provision of basic Internet access. *See, e.g.*, RCN, http://www.rcn.com/new-york/high-speed-internet (last visited Apr. 20, 2010) (listing provision of "Fiber-Optic Internet Speeds" separately from "special access" to services such as ESPN360.com and Disney Connection). These special services—also offered by providers such as Comcast, AT&T, and Verizon—are easily distinguishable and delinkable from the providers' basic offering of unfettered Internet access, which all providers list first on their customer-facing websites. Furthermore, Internet access providers typically do not compete on these special content offerings, nor do they distinguish within their own array of Internet access options based on the presence or

absence of special content offerings. Both among competitors and within their own internal pricing plans, Internet access providers differentiate based on speed and price, not content.

RCN, for instance, currently offers three high-speed Internet access options, distinguished only by speed and price. *See* RCN, http://www.rcn.com/new-york/high-speed-internet/services-and-pricing (last visited Apr. 20, 2010) (offering 1.5 Mbps Internet for $16.99/month, 10 Mbps Internet for $26.99/month, and 20 Mbps Internet for $51.99/month in New York, NY). From the webpage describing these three speed options, one must click on a separate, smaller box marked "Included Features" in order to compare associated content offerings; a click on this box reveals that all three speed/price plans offer the same exact set of content offerings. Similarly, Comcast lists four high-speed Internet access options, again differentiated only along the parameters of speed and price. *See* Comcast, https://www.comcast.com/localization/localize.cspx (last visited Apr. 20, 2010) (offering 1 Mbps Internet for $24.95/month, 12 Mbps Internet for $42.95/month, 16 Mbps Internet for $52.95/month, and 50 Mbps Internet for $99.95/month in New Haven, CT).

This is in stark contrast to the world of cable and satellite television offerings, wherein different competitors strongly distinguish their subscription plans based on content and programming availability. For instance, RCN has noted that surveys "confirm the vital importance of local sports programming to a cable operator's success: the data show that some 40-58% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service." Applications for Consent to the Transfer of Licenses, MB Dkt. No. 02-70, Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent (filed Apr. 29, 2002), at *31, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6513188003. The presence or absence of sports programming is thus a primary selling point for a cable provider; RCN concluded that a provider lacking this variety of programming "will have little or no chance of winning as subscribers as much as 40-70% of its potential customer base." *Id*.

In addition, although a service provider may provide a variety of specialized information services—ranging from website hosting, email service, and domain name lookup to more advanced services such as website caching and high-bandwidth cable subscription services—these optional services can easily be distinguished and regulated separately from the provider's basic transportation and telecommunications services, much as an answering machine or sound-enhancing device attached to a telephone can be distinguished from the provision of telephone service.

A dual regulatory scheme of the sort outlined above is not unheard of: for instance, cellphone providers are regulated both as common-carrier telecommunications services with respect to their provision of basic phone access,[15] and as information services with respect to their provision of richer media and content-based services to their wireless users.[16] This sort of bifurcated treatment for Internet access providers is also anticipated

by statute. *See* 47 U.S.C. § 153(44) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."). Justice Scalia, too, has argued that the activities of transporting and delivering content can be separated out from the process of providing enhanced information services. *See Brand X*, 545 U.S. at 1007 (Scalia, J., dissenting).[17]

In comments before the Commission, some providers argue that the proposed rules "would make it *per se* unlawful for broadband Internet access service providers to offer any content-differentiated service," such as "a 'family-friendly' service that would permit access only to online content that fits this description." *See, e.g.*, Time Warner Comments at 45. However, as shown above, it is clear that existing providers currently differentiate any such information service offerings from their broader promise to offer customers access to the entire Internet, and primarily compete with one another on the basis of Internet access speed and price, not on the basis of content. And again, the Commission's proposed rules would not prevent providers from offering their own separate information services and content programming—so long as in situations where providers do in fact offer "Internet access" to users, such access is offered on the nondiscriminatory terms set forth in the Commission's proposed rules.

Finally, some Internet access providers have argued that the regulations proposed in the Commission's NPRM may "preclud[e] market actors from enhancing particular messages to communicate more effectively with the public," and that such a preclusion amounts to a First Amendment violation. *See, e.g.*, AT&T Comments at 16-17, 235-44. Tribe and Goldstein raise the similar concern that net neutrality proposals "generally would require a [Broadband Service Provider] to treat all the data on its own network equally, forbidding it to make the choices that will benefit its users in the aggregate and that will respond to customers' desire to limit (or to accelerate delivery of) the Internet content they want to receive." Tribe and Goldstein Comments at 3.

There are a number of contestable factual claims to unravel from these contentions. First, Tribe and Goldstein suggest that under a net neutrality proposal, a broadband provider "could not refuse to carry certain content (because it was, for example, offensive)." *Id.* Second, they claim that a provider could not "speed its delivery of particular content to premium subscribers." *Id.* Third, they claim that a provider would be unable to "limit the volume of data of a handful of customers who interfere with others' access to the Internet by putting tremendous strains on the network through massive file downloads." *Id.*

The first of these contentions has already been addressed: the Commission's proposed rules leave open the option for Intenet access providers to block various forms of categorically unlawful content, and other forms of offensive content if requested to do so by a user. Certainly, there exist clearly established categories of content that access providers are *legally*—not just morally, or ethically—obligated to take down. These categories include child pornography, material relevant to law enforcement and anti-terrorism activities, copyright-infringing material if access providers have actual knowledge of said material, and other categories of obscene or unlawful content. For obvious reasons, the Commission's proposed regulations would not prevent Internet

access providers from filtering, removing, or disclosing these categories of content. *See* NPRM ¶ 139 (proposing that access providers "would not violate the [Commission's proposed Internet] principles in taking reasonable steps to address unlawful conduct on the Internet" and could "reasonably prevent the transfer of content that is unlawful"). Beyond these clearly established categories, Internet access providers will likely have the additional ability under the Commission's proposed rules to block "harmful traffic" such as spam and malware and "traffic unwanted by users" such as pornography, all as part of reasonable network management practices. *See* NPRM ¶ 138.

As to the latter two of Tribe and Goldstein's contentions, these both concern activities that fall outside the scope of First Amendment scrutiny. *See supra* Part I. But in any case, the activities are not barred under the Commisson's proposed rules. The proposed rules would permit metered pricing, as well as the capability to charge users more for faster speeds—two practices that every Internet access provider already engages in, and which would not be affected by the Commission's proposed rules. Finally, prior rules of the Commission have permitted the provider of a basic transportation or telecommunication service to engage in network management by "structur[ing] its communications network such that the network efficiently functions as the basic building block to perform myriad combinations and permutations of information processing, data processing, process control, and other enhanced services." Second Computer Inquiry, *Final Decision*, 77 F.C.C.2d 384, ¶ 96, 47 Rad. Reg.2d (P & F) 669 (1980). There is no reason to expect that the current set of rules would not permit Internet access providers to engage in similar forms of network management.

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Thus, under the Commission's proposed regulations, Internet access providers would not be unconstitutionally compelled to speak the message of the Government or of any other entity. To find otherwise would "plainly overstate[] the expressive nature of the[] activity, and the impact of the [proposed regulations] on it, while exaggerating the reach of . . . First Amendment precedents." *See Rumsfeld v. FAIR*, 547 U.S. at 70.

B. The fact that Internet access providers transport content and applications on the "medium" of the Internet does not indicate that any special or heightened degree of First Amendment protection applies to their conduct.

1. *Reno v. ACLU* does not resolve the question of which actors on the Internet are speakers, and places emphasis on Internet *users*, not Internet access providers, as speakers.

The Supreme Court has not clarified the constitutional status of the conduct engaged in by Internet access providers. In *Reno v. ACLU*, the Court recognized that the Internet presented an exemption from the rationale typically given in broadcasting cases for upholding the regulation of a "physical control of a critical pathway of communication," *see, e.g.*, *Turner I*, 512 U.S. at 657, given that communication on the Internet was not under similar control of a handful of broadcasters. *Reno v. American Civil Liberties*

Union, 521 U.S. 844, 868-69 (1997). The Court described the Internet as a "unique and wholly new medium of worldwide communication," *id.* at 850, replete with countless modern "town crier[s]" and "pamphleteer[s]." *Id.* at 870.

Yet *Reno v. ACLU* does not on its own resolve the question of which particular actor should be the recipient of the strong protection because it does not resolve the question of which actors are "speakers" in the First Amendment sense.[18]

The Court emphasized the importance of Internet *users* as town criers, pampleteers, and content-providers—but did not reach the question of what protection, if any, the First Amendment might provide *owners* of the telecommunications infrastructure. *See Reno v. ACLU*, 521 U.S. 844. *Reno v. ACLU* contains an overwhelmingly content-driven analysis of the Internet, paying little attention to the underlying communications infrastructure that makes possible the range of diverse and antagonistic content generated by users. The opinion's only reference to access providers or Internet Service Providers is to note that "[i]ndividuals can obtain access to the Internet from many different sources." *Id.* at 850 (noting the existence of service providers such as America Online, CompuServe, the Microsoft Network, and Prodigy through which users gain access both to "extensive proprietary networks as well as a link to the much larger resources of the Internet"). When the Court described who it considered speakers and "publishers" of information on the Internet, it focused on users and implicitly rejected the idea that the provision of underlying infrastructure is an expressive activity:

> Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.

Reno v. ACLU, 521 U.S. at 853. Nowhere does *Reno v. ACLU* suggest that an Internet access provider functions as a publisher merely by providing transport services.

The Internet has evolved away from the walled garden information services once provided by Prodigy, America Online, the Microsoft Network, and CompuServe, which the Supreme Court in *Reno v. ACLU* described as "online services" that "offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet." 521 U.S. at 850.[19] The metaphors in *Reno v. ACLU* of the Internet as a "vast library . . . and a sprawling mall offering goods and services," *id.* at 853, may presume some curatorial or editorial role to be played by those granting access to the Internet's wealth of information and users. But since the issuance of that opinion (and in the absence of any editorial competition on the part of Internet access providers as to how the Internet should be structured), the Internet has grown far more "vast" and "sprawling," to an extent that it is no longer feasible to use enclosed spatial metaphors to describe the startling diversity of users, curators, aggregators, content-providers, and application makers on the Internet.

The increased diversity of publishers (both in terms of content and applications) is a function of the Internet's distributed architecture and layered infrastructure. Rather than operating in an enclosed and centralized private network, the Internet operates as a network of networks that consists of a number of interlocking components and a variety of forms of speech and non-speech content and protocols. This structure differs significantly from both cable broadcasting and from newspaper publishing due to its multi-layered network model and its multilateral environment of speech interests. There are four primary functional layers in the architecture of the Internet. Starting from the physical layer of wires and switches, and moving up through the logical, applications, and content layers, users are primarily located in the "top" two of these layers, while the "bottom" two logical and physical layers comprise the underlying network infrastructure. Within the content and applications layers, there are multiple relevant media and types of participants that engage in various forms of expressive and functional activities, often engaging in both types of activity within the same transaction or software-driven interaction. At the layers that comprise the network infrastructure, on the other hand, participants primarily engage in functional activities. These layers are conceptually "separate" insofar as the logical and physical layers of the network serve as a standardized platform for a wide array of unpredictable content and applications, and insofar as parties can develop content and applications at the higher layers without needing to interact or enter into agreements with entities at the underlying logical and physical layers. This separation is enabled by the Internet Protocol, which divides all communications at the top layers into packets that can be individually routed from one server to another and eventually to their destination.

With this distributed communications architecture in place, expressions transmitted across the Internet are developed at the edges of the network, rather than being broadcast from centralized nodes. The diversity of thought and inquiry on the Internet can be traced back not to a few centralized sources but to millions of individual users who cluster around particular topics that interest them—and then form peer communities and discussion groups wherein they can debate and collectively determine how they will take up those particular topics. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 168-69 ("What emerges in the networked information environment . . . will not be a system for low-quality amateur mimicry of existing commercial products. What will emerge is space for much more expression, from diverse sources and of diverse qualities."); *see also* Mark Lemley and Brett Frischmann, *Spillovers*, 107 COLUMBIA L. REV. 257 (2007) (describing positive externalities and "spillover effects" resulting from a layers-based Internet architecture). Specific websites and applications then pool and aggregate these diverse discussions so that they can be accessed through search engines or common databases.

The result of this radical decentralization of creative expression and corresponding development of edge-driven innovation is a different conception of the purposes of the First Amendment. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE v.2 236 ("Relative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption—all these features and consequences of the Internet protocol make it difficult to control

speech in cyberspace."); *see also* Neil Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 960 ("For Benkler, . . . First Amendment goals are best served by allowing peer communication to flourish and preventing the mass media from reasserting the one-way hub-and-spoke model in the digital network arena. Radically distributed clusters of inquiry, debate, and collective action make up the backbone of our system of free expression in the digital age."). Instead of relying upon one-way broadcasters to provide the "diverse and antagonistic" expressions upon which traditional First Amendment theories have relied, the Internet enables the solicitation of diverse views from a spillover-rich environment without the need for centrally managed selection of which "programming" users should receive.

Rather than being forced to solicit and strain the expressions of content and application providers through central bottlenecks and gatekeepers, the relevant speakers in the digital age are already vested with a platform for their speech. The regulatory challenge is to keep that platform free from centralizing, gatekeeping "old media" forces—and from laws that stand in the way of the construction of efficient mechanisms for the creation and sharing of user-generated speech. *See* Richard Posner, Introduction to the Becker-Posner Blog (Dec. 5, 2004), http://www.becker-posner-blog.com/archives/2004/12/introduction_to_1.html (describing blogging as "a fresh and striking exemplification of Friedrich Hayek's thesis that knowledge is widely distributed among people and that the challenge to society is to create mechanisms for pooling that knowledge"). The regulatory challenge is to preserve the conception of the Internet as a modular system built upon common standards, where instead of needing to build one vertically integrated system, providers at different layers "are able to construct smaller pieces of the system, connect them at a defined interface, and not have to worry about what happens on the other side of the interface." Kevin Werbach, *Regulation in the Network Age*, 23 HARV. J. L. & TECH. at 196 (2009).

Creative expression on the Internet is thus not a function of the creativity or editorial ability of a given network provider; it is a consequence of the users and aggregators who are creating content and building applications atop that core general-purpose network. This capacity for user-driven creativity is premised on the fact that different gateways to accessing the network will all enable the same basic kind of access: rules of stability and interconnectedness provide assurance to content-providers and application makers that the information they distribute over the Internet will be accessible by anyone with an Internet connection, and thus grant these providers access to the network effects on which, in particular, social and "web 2.0" applications depend.

The falloff of Prodigy, America Online, and Compuserve also indicates that the formerly dual role of access providers as both creators of and conduits for content has been replaced by a core functionality of providing generalized "access" to the wealth of the universal Internet. Rather than competing on programming and content offerings, access providers increasingly compete along the more singular dimensions of speed of service and breadth of geographic coverage. Although many continue to offer email and website-hosting services to customers, even these services are fairly indistinguishable in character

from one another, and are not at the heart of the service provider's marketing efforts to consumers. Additionally, as noted above, Section 230 of the Communications Decency Act and Section 512 of the Digital Millennium Copyright Act exempt these carriers from various forms of tort and copyright liability for the communications they transport, and thus further disincentive the carriers from acting as speakers or editors of the content they carry. *See supra* Part I.A.5.

Compared with the activities engaged in by journalists and broadcasters, then, any interaction with or transmission of content by Internet access providers has a far more attenuated relationship with the press. The decision to treat Internet access providers as neutral carriers with respect to their transmission of content would not jeopardize or erode any existing "journalistic discretion of broadcasters in the coverage of public issues," *CBS v. Democratic National Committee*, 412 U.S. 94, 124 (1973), given that Internet access providers do not currently make such discretionary journalistic choices in determining how to structure their carriage of content and applications developed by others. Similarly, the activity recognized to receive heightened First Amendment protection in *Reno v. ACLU* is the development and aggregation of content and applications, not the mechanisms for delivery and transmission of such content and applications.[20] A regulation targeted towards these mechanisms—rather than towards the content itself—would accordingly not receive scrutiny under the First Amendment so long as the regulation's impact on speech was found to be minimal. *See IMS Health, Inc. and Verispan, LLC v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied* 129 S. Ct. 2864 (2009) (describing laws preventing the data-mining of patient prescription information as "inoffensive to the core values of the First Amendment . . . because they principally regulate conduct and, to the extent that they regulate speech at all, that putative speech comprises items of nugatory informational value").

2. The technological architecture of the Internet as a communications system rather than a broadcasting system prevents Internet access providers from exercising meaningful editorial discretion and control over the content and applications transported through their networks.

Another manner in which Internet access providers differ from the parade organizers in *Hurley*, and from cable providers and newpaper publishers, is in the technological architecture of the medium on which they operate.

Those who organize a parade surely do not supply all of the wide range of messages and expressions contained within that parade, just as those who organize a cable system do not themselves generate all—or in some cases even any—of the programming they transmit. What the organizers of a newspaper, cable system, and to a lesser extent a parade do, for the most part, is engage in a two-part process. First, they examine a range of possible candidates for inclusion within their particular medium of expression; then, they make a series of editorial selections as to which programming content—or in the case of a parade, which marching contingents—to include within their medium of expression. At the same time, they make a corresponding set of decisions as to which

candidates to exclude. The same process holds true for newspaper editors: most opinion pages can be described as "the presentation of an edited compilation of speech generated by other persons," *Hurley*, 515 U.S. at 570 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)), the presentation of which requires an explicit rejection of some proffered submissions as well as an implicit rejection of a much wider range of other unconsidered candidates. Organizers of these various media may be more or less "lenient in admitting participants," *Hurley*, 515 U.S. at 569, but in any case, all are essentially engaged in the process of producing speech and expression through a series of editorial decisions to include or exclude content. All make judgments about what messages to transmit and which messages to suppress.

Internet access providers, on the other hand, are unable to engage in the same degree of editorial discretion and selection. Compared to a parade, a cable broadcasting system, and a newspaper, the size of the relevant pool of potential "participants" on the Internet is so much more immense that it simply cannot be said that access providers make the same kind of individualized editorial decisions as to what content to include or exclude. In the context of cable, for instance, it is clear that broadcasters necessarily exercise some measure of discretion in determining what package of programming content to deliver to customers, and that customers differentiate between cable companies based on which basic and premium programming options are offered. But in the context of Internet access, there are so many "participating units" that the decision to include or exclude one or another of these units cannot possibly be said to have a substantial or even, typically, *de minimis* effect upon the "message" supposedly being conveyed by an access provider.

If the Internet were to be analogized to a parade, it would have to be considered the largest parade in the world—a parade to which *everyone* is invited to participate and everyone is invited to watch. Furthermore, it would be a "parade" not tethered to any time or physical location, and with no restrictions on access. *See Reno v. ACLU*, 521 U.S. at 851 ("Taken together, these tools [e-mail, listservs, newsgroups, chat rooms, and the World Wide Web] constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.")

In *Hurley*, the Court noted that "*[r]ather like a composer*, the Council selects the expressive units of the parade from potential participants." *Hurley*, 515 U.S. at 574 (emphasis added) (finding that "each contingent's expression in the Council's eyes comports with what merits celebration on that day"). Few designations could be more inaccurate in describing the activities of an Internet access provider than that of a "composer." In contrast to the compositional conduct of the parade organizers in *Hurley*, there is no sense in which access providers can exercise an even roughly similar degree of editorial discretion over the wealth of content on the Internet. The complete absence of scarcity at the content and application layers of the Internet, the tremendous variety of modes and forums for expression, the ever-changing structure of those expressions, and the constant creation of new expressions all militate against the possibility of an Internet access provider's ongoing editorial supervision of the content traveling through its networks. *See Reno v. ACLU*, 521 U.S. at 870 (describing the Internet as a "dynamic,

multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue").

In *Rumsfeld v. FAIR*, the Court found that the selective activities engaged in by hosts of recruiting events fell outside the scope of First Amendment protection. 547 U.S. 47. Notably, when compared to the relevant actors in *Rumsfeld v. FAIR*, Internet access providers play a far *less* selective and far more attenuated role with respect to the content and applications being transported through their networks. Whereas a law school administrator must analyze a pool of potential recruiters and make a variety of content-based, time-based, and space-based decisions as to which of these recruiters to invite to campus and which to exclude, the expansive and evolving medium of the Internet prevents an access provider from making these same decisions. Internet access providers do not make any meaningful ongoing editorial decisions as to which content to allow within their networks and which to suppress. *See Rumsfeld v. FAIR*, 547 U.S. at 70 (law "incidentally affect[ing] expression" found to be permissible under the First Amendment).[21]

II. EVEN IF THE COMMISSION'S PROPOSED REGULATIONS WERE FOUND TO REGULATE SPEECH OR EXPRESSIVE CONDUCT, THEY WOULD BE UPHELD UNDER THE INTERMEDIATE SCRUTINY STANDARD SET FORTH IN *TURNER*.

Even if Internet access providers were found to be speakers for purposes of the First Amendment—which is unlikely, for the reasons given in Part I—the Commission's proposed regulations would still easily survive any First Amendment challenge under the applicable intermediate scrutiny standard set forth in *Turner*. A court would find that the Commission's nondiscrimination rule does not burden substantially more speech than is necessary to accomplish the purpose of preserving and promoting an open Internet.

A. The proposed regulations are content-neutral and are not intended to regulate speech based on the message it conveys.

Because "not every interference with speech triggers the same degree of scrutiny under the First Amendment," a reviewing court "must decide at the outset the level of scrutiny applicable" to the regulations. *Turner I*, 512 U.S. at 637. A court will apply the strictest level of scrutiny where the government "adopt[s] a regulation of speech because of disagreement with the message it conveys," *Ward*, 491 U.S. at 791, or where the government's "manifest purpose is to regulate speech because of the message it conveys." *Turner I*, 512 U.S. at 645. In either case, in determining whether strict scrutiny should be applied, "[t]he government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791.

Strict scrutiny is inappropriate where, as here, the government "tak[es] steps to ensure that private interests not restrict, through physical control of a critical pathway of

communication, the free flow of information and ideas." *Turner I*, 512 U.S. at 657 (citing *Associated Press v. United States*, 326 U.S. at 20).

Like FedEx or the United States Postal Service, Internet access providers traditionally have not offered discriminatory prices or service offerings on the basis of the *content*—as opposed to the size or latency requirements of the content—being transmitted through their networks. Historically, the TCP/IP protocol set up a virtual must-carry rule for all content transmitted over the Internet. *See* Tim Berners-Lee, *Realizing the Full Potential of the Web* (Dec. 3, 1997), http://www.w3.org/1998/02/Potential.html. The Commission now is attempting to codify that historical practice with an enforceable nondiscrimination rule, which would render it illegal for an Internet access provider to slow down or block content or applications for purposes unrelated to reasonable network management practices. The proposed rule would apply principles of nondiscrimination derived from the Communications Act of 1934 and other areas of telecommunications law to the provision of Internet access, without an eye towards the content being provided through such Internet access. *See, e.g.*, §§ 201(b), 202(a), & 251(c)(2)(D); *Hush-a-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968). The Commission's proposed nondiscrimination rules apply equally to all lawful content transported by Internet access providers.

The fact that the proposed regulation does not draw lines based on the content of speech indicates that the rule is not based in any disagreement with *ideas* that Internet access providers are seeking to express, or any desire to limit the free expression of access providers. It is justified instead by a range of economic motivations reflected in the Commission's NPRM and in the purposes of broadening nondiscriminatory access to the Internet more generally. These motivations include lowering the cost of expression by preventing the private erection of barriers to or surcharges on individual and public expression, communication, and association; promoting a connected citizenry able to engage with government on these platforms; and unleashing robust competition on the content and applications layer of the Internet between a variety of communication and media-creation platforms such as Twitter, YouTube, Wikipedia, Facebook, and other information services.

B. The proposed regulations advance important governmental interests unrelated to the suppression of free speech and expressive conduct.

Where a regulation is content-neutral, as here, it will be found constitutional under the First Amendment "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). This substantial burden standard does not require that a regulatory scheme be the least-intrusive scheme possible. *Id.* at 217-18 ("[W]hen evaluating a content-neutral regulation which incidentally burdens speech, [the Court] will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive" on expressive conduct.).

The interest underlying the Commission's proposed regulations—seeking to promote neutral provision of Internet access in order to cultivate diverse and antagonistic sources of information on the Internet—is actively antagonistic to the suppression of expression. *See O'Brien*, 391 U.S. at 377; *see also Turner I*, 512 U.S. at 662. The Commission's interest instead reflects a principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Hence the proposed regulation is manifestly unrelated to the suppression of speech or expressive conduct.

Verizon argues that the Commission "has not provided evidence of any government interest that would warrant rules that limit speech in that manner beyond mere speculation about hypothetical future possibilities, and the kinds of broad proscriptive rules proposed here are not even arguably narrowly tailored to achieve legitimate goals." Verizon and Verizon Wireless Comments at 111. Verizon suggests that the regulation would unduly limit the "editorial discretion" of a broadband provider in "promoting or featuring certain chosen content in accordance with its own judgment even while it provided access to all lawful content on the Internet through traditional Internet access services." *Id.* at 113.

The discretion of cable providers, broadcasters, and other access providers has been limited, however, by a concomitant recognition that the First Amendment "'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.'" *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (quoting *Associated Press*, 326 U.S. 1, 20 (1945)). The Supreme Court has recognized that the promotion of "'the widespread dissemination of information from a multiplicity of sources'" and the promotion of "'fair competition in the market for television programming'" are both "important governmental interests." *Turner II*, 520 U.S. at 189-90 (quoting *Turner I*, 512 U.S. at 662) (identifying public access to information sources as a "governmental purpose of the highest order"). Because Internet communications have now become, like broadcast television, "an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression," *id.* at 194, the Commission has two strong interests in promoting widespread dissemination of information and in promoting fair competition in the markets for Internet content. These strong interests are continually recognized in the Commission's proposed rules and in the factual findings on which the rules are based.

Additional limits on the discretion of broadcasters are founded on a functional distinction between newspapers, which the Court has characterized as "more than a passive receptacle or conduit for news, comment, and advertising," *Tornillo*, 418 U.S. at 258 (noting the degree to which newspapers "exercise . . . editorial control and judgment" through engaging in "choice of material[,] . . . decisions made as to limitations on the size and content[,] . . . and treatment of public issues . . .—whether fair or unfair"), and cable systems, which the Court has described as conduits through which the signals of others are broadcast. *Turner I*, 512 U.S. at 629 ("[T]he cable system functions, in essence, as a

conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers."). Given that Internet access providers do not even engage in the preliminary "select[ion of] programming sources" for the vast majority of content and applications accessed by Internet users, *cf. id.*, they are even less likely than cable providers to be shielded by claims of discretion over the conduits they manage.

Furthermore, where there is no feasible option for participants who are denied access to a forum or network to organize an alternative forum or network of their own, courts are more likely to find that those who own the forum or network enjoy a "monopoly of access" to an audience. *See Hurley*, 515 U.S. at 578. In *Hurley*, the Court noted that "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own" but acknowledged that GLIB would likely be capable of "obtaining a parade permit of its own" if it failed to obtain access to the existing parade. *Id.* Although Google may currently be investing in high-speed fiber networks, *see* Google, Think big with a gig: Our experimental fiber network, http://googleblog.blogspot.com/2010/02/think-big-with-gig-our-experimental.html (describing plans "to build and test ultra high-speed broadband networks in a small number of trial locations across the United States"), it is doubtful that even a company as large as Google is fully capable of staging an Internet ecosystem of its own.

Content and application providers operate not within an easily replicable private network but instead within an ecosystem that is comprised of "an international network of interconnected computers." *Reno v. ACLU*, 521 U.S. at 849. Consequently, these providers have business models that crucially depend on gaining access to as many users as possible, rather than the smaller number of users within just one network. And if it is difficult for an entity as large as Google to simply pick up and take their business elsewhere, such an activity is entirely beyond the realm of possibility for the wide range of smaller Internet content and application providers; such providers would certainly be unable to fund the necessary research and investment to create an entirely new replacement access network if it became clear that they were unable to reach the subscribers of one or more of the larger Internet access providers. *Cf. Hurley*, 515 U.S. at 578. The limited ability of content and application providers to stage alternative networks means that those who control the underlying data transmission services may effectively exercise a termination monopoly over those content and application services.

At the same time, the consolidation of the Internet access industry creates massive opportunities for discrimination in favor of the provision of vertically integrated services and against the provision of outsider content and applications. *See Turner II*, 520 U.S. at 198 ("[V]ertical integration gives cable operators the incentive and ability to favor their affiliated programming services."). Internet access providers have both the incentive and a substantial opportunity to use their bottleneck control over access to the Internet to harm these external markets for Internet content and applications. The Supreme Court has recognized a strong governmental interest in counteracting such powers of private termination, *see Associated Press*, 326 U.S. at 20. ("Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that

constitutionally guaranteed freedom."), on which the Commission now proposes to act. Despite claims that access providers would not seek to eliminate positive externalities generated by external content and applications that are a major driver of Internet usage, the Commission has presented substantial grounds for an economic argument that access providers will work to distort the currently vibrant state of competition in the markets for Internet content and applications. *See Turner II*, 520 U.S. at 201 ("[C]able has little interest in assisting, through carriage, a competing medium of communication."). Compared to cable broadcasters, Internet access providers exercise a termination monopoly over a wider variety of services—not just content-based programming from individual information service providers, but also the mechanisms for aggregation, search, platformization, and tool-building generated by users and application providers that have been at the heart of the Internet's growth. The Commission's proposed solutions of a nondiscrimination mandate plus disclosure requirements are economic in structure and are entirely unrelated to the regulation of speech, content, or viewpoints.

Accordingly, the proposed rules "serve[] the Government's interests 'in a direct and effective way.'" *Turner II*, 520 U.S. at 213 (quoting *Ward*, 491 U.S. at 800).

C. The regulations do not burden substantially more speech than necessary in order to achieve governmental interests.

Under intermediate scrutiny, the Government "may employ the means of its choosing" to promote a given interest "'so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' and does not 'burden substantially more speech than is necessary to further' that interest." *Turner II*, 520 U.S. at 213 (quoting *Turner*, 512 U.S. at 662).

Unlike *Chesapeake & Potomac*, where a law barred common carrier telephone companies from providing video programming, the Commission's proposed regulations do not foreclose entry into an entire medium of communication; rather, they simply ensure that all who provide facilities for a given form of communication do so in a nondiscriminatory manner. The regulations are reasonably calculated to sustain and increase users' and speaker's access to the open Internet, based on a reasonable finding that unfettered broadband access has become part of the infrastructure of free expression and a precondition for effective free speech. At the most, the proposed regulations contain a rule of general applicability, as in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) or *Associated Press v. United States*, 326 U.S. 1 (1945), that may incidentally restrict some forms of expressive opportunity.

Additionally, the Commission's proposed regulation leaves open ample opportunities for Internet access providers to engage in network management. Even under the proposed nondiscrimination rule, access providers may continue to stop the spread of spam, fight against malware and virus-based attacks on network infrastructure, mitigate against the possibility of traffic congestion by efficiently routing and limiting access and certain times and places (so long as they do not allow "permanent" traffic congestion solutions to lapse into place where building network capacity would be an equally feasible means of

accomplishing the same anti-congestion goals), assist the activities of law enforcement, and distribute optional filters for the protection of children from offensive content.

Separately, AT&T argues that the proposed regulations would "violate the free-speech rights of content and application providers (including AT&T itself) that may seek to enter into prioritization and enhancement arrangements with ISPs in order to improve the quality of their offerings and ensure that their 'speech' is heard in a certain manner and by the widest audience possible." AT&T Comments at 241. AT&T suggests that these external providers of applications, content, and speech "may determine that an arrangement with an ISP (such as a multicasting arrangement) is the least expensive way to get their message to the most people with the highest quality and assurance." *Id*. AT&T concludes that the Commission's efforts to preclude these enhanced-speech arrangements "in order to ensure that other, 'unenhanced' voices on the Internet are heard" amounts to a content-based restriction on speech that would be subject to strict First Amendment scrutiny. *Id.* at 242-43.

But unlike in *Turner*, where the Court found that must-carry requirements would "render it more difficult for cable programmers to compete for carriage on the limited channels remaining" on their service, *Turner I*, 512 U.S. at 637, 645, the regulations at issue here actually make it more feasible for content and application providers to compete for carriage on the networks of Internet access providers.[22]

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The proposed regulations would survive intermediate scrutiny because they are content-neutral regulations not targeted towards speech. The regulations do not seek to enclose censorial intent within a neutral-seeming term, nor are they censorial in effect, *cf. Denver Area* (invalidating regulation on grounds of its unstated intention to suppress speech with undesirable content); rather, they present a clear and well-considered governmental response to an identifiable problem. Preserving an open and unfettered communications system is a recognizably strong governmental purpose under *Turner I*, in which the court reiterated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U.S. at 663 (1994).

III. CONCLUSION

A firm technological understanding is in place on the Internet; this established technological scheme should not be dislodged through the discretionary introduction of a novel theory of First Amendment interests into a domain where no speech occurs. The theory of strong First Amendment protection advanced by some parties in this proceeding fails to illuminate the debate over the proper scope of reasonable network management. Not only does the proffered analogy to other forms of speech fundamentally mischaracterize the nature of the conduct associated with telecommunication technologies, it also attempts to shut down this debate before it begins by suggesting that

any management of user and third party content is *per se* within the speech rights of the access provider to perform.

The question at issue has been whether Internet access providers engage in any form of speech or expressive conduct through their provision of Internet access, and whether a proposed regulation affecting their provision of Internet access thus warrants some degree of scrutiny under the First Amendment. Courts determine whether an entity is engaged in speech or expressive conduct based in part on a consideration of the content, context, and medium of the relevant activities, and in part on the understanding of those who view or receive the conduct as to whether they are viewing or receiving a message. Based on an application of these factors to the activities and conduct of Internet access providers, it is clear that such providers do not engage in speech or expressive conduct with respect to their provision of access to the worldwide Internet. Accordingly, the nondiscrimination rule proposed by the Commission regulates neither the speech nor expressive conduct of Internet access providers in a manner that is cognizable for purposes of the First Amendment.

notes

1 The FCC addressed many of these concerns in its 2008 order finding that Comcast had violated the FCC's *Internet Policy Statement* by interfering with subscribers' use of the BitTorrent protocol and other peer-to-peer networking applications. *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (barring Comcast from interfering with its subscribers' use of peer-to-peer networking applications). In a footnote responding to the First Amendment concerns raised by another broadband provider with respect to the Comcast case, the Commission explicitly stated that its Order "does not prevent Comcast from communicating with its customers or others." *Id.* at 26 n.203 The Commission denied that it was "dictating the content of any speech," and rejected the notion that Comcast itself would even be deemed (by its customers) to *be* the speaker of any content delivered through peer-to-peer applications. *Id.* The Commission instead found that subscribers would be more likely to attribute peer-to-peer content "to the other parties with whom they have chosen to interact through those applications." *Id*. For these reasons, the Commission rejected a proposed analogy of broadband providers to newspapers, and found that no First Amendment concerns were raised by its enforcement of a nondiscrimination rule against Comcast.

2 For instance, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" do not receive First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Many additional categories of conduct are not

inherently expressive and thus do not receive First Amendment protection, despite containing communicative elements. *See, e.g.*, *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978) (classifying agreements in restraint of trade as outside of First Amendment scrutiny); *Giboney*, 336 U.S. at 498 (communications in furtherance of crimes not protected by First Amendment).

3 Implicit in a user request for content, one might say, is a corollary request—and a settled expectation—that no spam or viruses be attached to the delivery of the requested content.

4 Numerous businesses supplying applications and content to users rely on predictable non-interference from the network infrastructure on which their information exchange platforms are built. If disclosure and nondiscrimination rules were not in place, the resulting situation would be analogous to one in which the owners of the power grid could ban users from plugging in a computer or a toaster, or grant more power to certain applications than to others on the same connection, or change voltages without notice to users. The disclosure and nondiscrimination rules proposed by the Commission are thus first and foremost about promoting users' reliance upon an open, neutral, and reliable network. The Commission's proposed rules are targeted not towards the message, speech, or expressive conduct of Internet access providers; instead, they are targeted towards the functional effects of access providers' conduct within the ecosystem of the Internet.

5 Recognizing the "message" of a parade as more diffuse and decentralized than the message of a newspaper, the court still decided to extend First Amendment protection on the principle that a speaker should not be found to forfeit protection merely by "failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. The court found that the group in question wished to use its participation in the parade "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade." *Id.* at 570. Clearly, the organization of the parade implicated a decision to express, or repress, a viewpoint and an identity.

6 A search engine, for instance, can plausibly be said to make a context-sensitive evaluation of a user's search query, profile, and prior web-browsing history in order to determine what content best corresponds to the content it believes the user was looking for (and indeed, can compete with other search engines based on how well it makes this determination).

7 This characterization of Internet access as the provision of a neutral access conduit or transportation gateway to the wider Internet is not simply a legal characterization for purposes of this filing. It also accurately reflects the dominant way in which Internet access providers themselves characterize their services, both in marketing materials and in earnings calls, to the general public—through references to unfettered, unimpeded, uninterrupted, and/or unrestricted access to the entire Internet or World Wide Web.

8 A content or application provider may hold a conflicting viewpoint or subscribe to a different ideology from that of an Internet access provider. However, if this viewpoint is merely included or excluded as a result of an access provider's non-expressive conduct, then no First Amendment scrutiny applies to a regulation of that access provider's conduct.

9 Indeed, the user may be entirely unaware of the role played by the access provider in delivering content, and may think of the browser (Firefox, Internet Explorer, Safari, etc) or even the operating system (Mac OSX, Windows, Linux, etc) as the relevant unit of content-delivery.

10 Speech rights may accrue to some of these information intermediaries as a result of their careful aggregation, arrangement, and management of the information that flows through their platforms. However, a clear distinction remains in place between an information aggregator such as Facebook and a communications transportation mechanism such as an Internet access provider, with no speech rights accruing to the latter, non-expressive actor.

11 To some degree, Internet access providers open their networks to the public and thus serve as a conduit for public speech in a manner analogous to the proprietors of the shopping mall in *Prune Yard Shopping Center*, who were found to run "a business establishment that is open to the public to come and go as they please." *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). In addition, they have benefited from heavy governmental investment in the provision of Internet access services, including grants of rights of way, licensing and franchising access (rather than open or unlicensed access), spectrum allocation, and other grants. These federal investments and subsidies imply some corresponding degree of ability to control how providers manage access. However, it should be noted that the fact of federal provision of services was not a necessary condition to the rejection of First Amendment claims in *Rumsfeld v. FAIR*.

12 In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798 (2002). This classification scheme was upheld in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

13 Title II of the Telecommunications Act of 1996 generally imposes three types of regulations on providers of telecommunications services: Section 201 bans "unjust or unreasonable rates or practices," Section 202 prohibits "unjust or unreasonable discrimination," and Section 208 structures the complaint process.

14 Justice Scalia's dissenting opinion in *Brand X* makes clear that with respect to their functionality as deliverers and neutral conduits of information, Internet access providers can be subject to neutrality and nondiscrimination obligations. Where the "information" that an Internet access provider transmits is incidental to a communication between two external parties, then the access provider is functioning as a telecommunications service under Title II, not as an information service.

15 *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 15817 (2007) (maintaining common carrier status under Title II for cellphone providers).

16 *See* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 22 F.C.C.R. 5901 (2007) (classifying wireless broadband access provided by cellphone carriers as an information service).

17 Dissenting in *Brand X*, Justice Scalia offered the following analogy to support the notion that the provision of telecommunications services could be distinguished from the provision of information services, even when offered by the same carrier.

> "If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," ante, at 18, would prevent them from answering: "No, we do not offer delivery–but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you do offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.' " *Cf. Declaratory Ruling* 4823, ¶39; ante, at 16, 26. Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.

Brand X, 545 U.S. at 1007.

18 The Court in *Denver Area* offered forbearance as a possible explanation for why this question of how to apply the finer points of First Amendment protection to a new technology was left unresolved. *See* 518 U.S. at 747 (opting to employ a contextual method of First Amendment review based on a "complex balance of interests" in analyzing the regulation of sexually explicit material on cable television); *see also id.* at 777 (Souter, J., concurring). ("[W]e should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'" (citation omitted)).

19 Prodigy, America Online, and Compuserve were themselves not Internet access providers in the sense that Verizon, AT&T, and Comcast are today; rather, these early walled-garden networks were services into which users could dial *with* their general-purpose phone lines. But because the providers of these phone lines were under Title II common carrier obligations under the Telecommunications Act, they were effectively banned from charging additional fees or imposing differential access and speed obligations to users of these dialup services. Prodigy, America Online, and Compuserve could not have existed were it not for a general-purpose telecommunications platform

that enabled users to access these independent services on a nondiscriminatory basis. No additional fees were charged either to users themselves or to the Internet companies that enabled these users to dial into the Internet.

20 Although one District Court has observed that "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,'" *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)), courts generally resist from employing so broad a conception of the press as to swallow up new technological modes for the creation and distribution of content and applications.

21 Internet access providers are similarly unable to demonstrate that they engage in the editorial decisionmaking that precedes the "selection of contingents to make a parade" or "the presentation of an edited compilation of speech generated by other persons." *See Hurley*, 515 U.S. at 570; *see also Turner I*, 512 U.S. at 636 ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek[] to communicate messages on a wide variety of topics and in a wide variety of formats.").

22 In the instance of cable, Judge Richard Posner, writing for the Seventh Circuit, has noted the inefficiency of any rule that would prevent networks from entering into contracts with content-producers: "If forbidden to buy syndication rights, networks would pay less for programs, so the outside producers would not come out clear winners—indeed many would be losers. Production for television is a highly risky undertaking, like wildcat drilling for gas and oil." *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1045-46 (7th Cir. 1992). But in the different context of Internet access, it is in some sense much *less* risky to produce and distribute content: political advertisement videos, independently produced films and websites, response videos, pilot and beta-testing programs (Gmail, other Google products), and viral videos all demonstrate the extent to which content-producers are able to test out media productions and applications at a low cost and with little risk on an open Internet. These representative instances of Internet-based production are hardly "wildcat drilling"; they are more akin to putting a bucket in a streamful of minnows, and seeing what one catches.

Judge Posner suggested that the ownership-limitation rule at issue in *Schurz* "appear[ed] to harm rather than help outside producers . . . by reducing their bargaining options." 982 F.2d at 1054. However, such bargaining options are less relevant where the content-producers might well be far too small to enter into contracts with network providers, where network providers might be unskilled at recognizing the value of prospective complementary inputs, and where the economic promise of such startup firms is difficult to predict in advance of market entry—all of which factors frequently apply within the Internet ecosystem.